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IN THE

Supreme Court of the United States

October Term, 1970

No. 1307

ELIZABETH BELLAMY, JAMES HUNTER,
MARY MANN and JAMES D. OREE,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of United States:

The petitioners, Elizabeth Bellamy, James Hunter, Mary Mann and James D. Oree, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against them in the above-entitled case on January 4, 1971.

A.

The Opinion Below

There was no opinion or written finding of fact by the presiding judge. The affirming opinion of the Circuit Court

of Appeals on January 4, 1971 as docket number 34977 has not yet been reported. All defendants are incarcerated and have been since their convictions in the District Court on April 30, 1970.

B.

Jurisdiction

The judgment of the Court of Appeals was entered on January 4, 1971. Jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that the review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C.

Questions Presented

1. Did the search warrant conform to the legal requirement set forth in *Spinelli* v. *U. S.*, 89 S. Ct. 584, *Aguilar* v. *Texas*, 378 U.S. 108 and *Ventresca* v. *U. S.*, 380 U.S. 102?

2. Can an attorney's delay act as a waiver of a plaintiff's constitutional rights?

3. Can the Government arbitrarily postpone the sentencing of co-conspirator witnesses without disclosing their motives?

4. Doesn't the prosecuting attorney have a legal duty to disclose a material misstatement in the affidavit used to obtain a search warrant?

5. Was the arrest of petitioners Hunter and Oree based on indepedent probable cause and if so, was not the burden on the Government to show this?

6. Was the statutory presumption (illegal importation of heroin) valid against Mann in the conspiracy count when the jury disagreed as to her guilt in the substantive count?

7. Did the judge's comments deprive petitioners of a fair trial and due process of law?

8. Was the warrant properly executed?

D.

United State Constitution and the Statutes

United States Constitution, Fourth Amendment.

United States Constitution, Fourteenth Amendment.

The statutes involved are: United States Code, Title 21, Sections 173 and 174.

E.

Summary Statement of Matters Involved

On November 29, 1967, at about 2:00 P.M., Petitioners Bellamy, Hunter, Mann and Oree were arrested along with co-conspirator Copeman and two other un-indicted women named Barrs and Wilson.

On the same date, agents of the Bureau of Narcotics obtained a *search warrant* for 1401 University Avenue, apartment 3-G, Bronx, New York. They did not have an *arrest warrant* for any of the petitioners.

Petitioners Hunter and Oree were arrested exiting the door of the multiple dwelling at 1401 University Avenue. There is no indication that they were in apartment 3-G prior to this arrest.

Petitioners Bellamy and Mann were arrested in apartment 3-G shortly thereafter. No contraband was discovered.

The indictment was not filed until 1969. There were several substitutions of attorneys prior to trial. However, none of the attorneys filed motions for severance or suppression until the eve of trial. The trial judge sustained the validity of the warrant without a hearing and refused to hold a pre-trial hearing concerning the warrantless arrests of Hunter and Oree, claiming that the dilatory tactics of counsel constituted a waiver by the defendants.

Co-conspirator Dennis Copeman testified for the Government and although he had been in jail since the arrest in 1967 (the trial was held in March, 1970), no disposition had been made of this charge or on his parole violations.

Narcotics seized from Copeman were admitted into evidence against all defendants as were narcotics seized from Hunter.

The jury found defendants Bellamy, Oree and Hunter guilty on both counts of a two-count indictment, but disagreed as to petitioner Mann's guilt on the substantive violation. She was convicted solely on the conspiracy charge.

There was no direct testimony that Mann had *personal knowledge* that heroin was illegally imported and no charge was made to the jury directing them to the legal argument that *each conspirator* must have *personal* knowledge of the

illegal importation or possession of the drug to invoke the statutory presumption.

F.

Reasons For Granting Writ

POINT I

The search warrant failed to conform to the requirements set forth in *Spinelli* v. *U. S.*, *Aguilar* v. *Texas* and *Ventresca* v. *U.S. (supra).*

Agent Coursey affidavit indicated that he received the information from "an informant who he believes to be reliable". A mere belief of reliability would not conform to the stringent requirements set forth by Justice Harlan in the *Spinelli* case. The reasons why the agent thought the informer was reliable must be clearly spelled out so that an impartial magistrate could appraise them. Agent Coursey also stated that the informant had "been known to your deponent only a short period of time". The affidavit also stated that "J. D. Oree has a previous conviction for violation of the federal narcotic laws". The affidavit fails to state any confirming information as to the leasees of apartment 3-G or the persons seen in apartment 3-G by the informant. The mere fact that automobiles were parked in front of a multiple dwelling and that the registered owners were suspects in other cases does not give a federal agent probable cause to enter one of the apartments of this multiple dwelling. The informant also fails to state the source of his information as to "Peewee" and "J. D."

POINT II

An individual defendant is not charged with knowledge of all the complicated federal procedures.

The mere fact that an attorney, whether retained or assigned, neglects to file the proper pre-trial motions with the proper supporting affidavits should not act as a waiver of petitioner's constitutional rights. Rule 41(e) provides that "prior to trial a defendant shall submit upon affidavit a notice of motion challenging the arrest and subsequent search". The District Courts and many Circuit Courts in the United States have held that this motion may be made at any time up to and including the trial of the case. The courts have also uniformly held that the criteria for establishing probable cause differs from the criteria used in substantiating a person's guilt beyond a reasonable doubt. Hearsay testimony can be used to substantiate warrantless arrests and an affidavit in support of a search warrant. However, hearsay testimony is not admissible during the course of a trial. It is for this reason that a pre-trial application challenging the arrest must be held outside the hearing of a jury so that the arresting agents can be examined concerning the source of their hearsay information.

The Circuit Court of Appeals and the District Court found that the evidence *at trial* was sufficient to establish probable cause. However, unless a pre-trial application can be heard or an application can be heard *outside* the presence of a jury, the attorneys cannot question the arresting agent concerning the source of the hearsay information. It would be a violation of a defendant's constitutional rights if the delay of his attorney would effectively bar any defendant from challenging a constitutional issue.

This Court has consistently held that any waiver of a constitutional right must be clear and unequivocal and the mere delay of an attorney is not the unequivocal waiver of a defendant and this court should reaffirm its position set forth in *Johnson* v. *Zerbst,* 304 U.S. 458.

POINT III

The undue, unfair and deliberate delay by the government in postponing the trial, parole hearing or sentence of a co-conspirator witness effectively deprived the defendants of due process of law.

A three-year delay from the time a co-conspirator has been arrested and charged with a parole violation and until his testimony is brought forth in court without a determining sentence, deprived petitioners attorneys of a great deal of potential cross examination. The Sixth Amendment of the United States Constitution provides for a speedy trial and disposition of criminal cases. This would also apply to a co-conspirator and Rule 45 requires sentencing within an immediate time of an adjudication of guilt. When the government admittedly offers some inducement to obtain the testimony of a co-conspirator, they cannot hide behind their promise, depriving the defendant of complete cross examination. This Court should determine whether or not a constitutional issue is involved when co-conspirators' testimony is instrumental in the conviction of these petitioners.

POINT IV

The prosecuting attorney has a legal as well as a moral duty to disclose material misstatements made by any witness, either at trial or in applying for a search warrant.

It was only at the time of sentencing when the attorneys brought forth the fact that J. D. Oree did not have a prior federal narcotics conviction, yet the affidavit for a search warrant indicated he did have a conviction. This should have been brought forth prior to trial so that the defense attorneys could have challenged the entire warrant. Additional disclosure was only brought forth at trial concerning the agents' claim that the informant entered the building along with the co-defendants. The testimony of the agents at trial did not indicate that any known person other than the defendants had entered the building. *Brady* v. *Maryland,* 373 U.S. 83 and *Burger* v. *U. S.,* 295 U.S. 101 placed this duty upon the prosecuting attorneys. This Court should grant certiorari in this case to see whether the prosecuting attorneys violated their sacred duty and deprived the petitioners of substantial constitutional rights.

POINT V

The Circuit Court of Appeals felt "that the highly suspicious conduct of Oree and Hunter as they left the building provided additional probable cause for the arrest".

Independent probable cause in a warrantless search must be proven by the government before the evidence is offered at trial. Petitioners reaffirm all the arguments made in Point II (*supra*) concerning the difficulties in challenging a war-

rantless arrest during the trial in the presence of a jury. This Court should grant a writ of certiorari to clearly define the government's burden in showing probable cause and whether or not the petitioners were deprived of certain constitutional rights by this particular type of trial.

POINT VI

The statutory presumption as to illegal importation must be shown in one of two ways: either by direct evidence that the defendant is aware that the contraband drug is illegally imported, *Leary* v. *U. S.*, 395 U.S. 45, or in the case of heroin, that possession of the narcotic drug without explanation allows the trier of facts to determine that the person who had possession knew heroin was illegally imported.

The Second Circuit Court of Appeals in *Messiah* v. *U. S.*, 307 F. 2d 62, stated that in order to convict a person of conspiring to violate the narcotic laws, each defendant must have either possession of the heroin or personal knowledge of the illegal importation. The jury's disagreement as to petitioner Mann of the substantive violation would indicate that the jury did not feel that Mann was in possession of the narcotic or had dominion or control; therefore the statutory inference could not be applied to her. In the absence of any direct testimony that Mann had personal knowledge that the heroin was illegally imported, the jury's disagreement as to the substantive count would bar this presumption applying to the conspiracy count. In the absence of a specific instruction to the jury, this Court should exercise the jurisdiction over federal trials and Rule 52 of the Federal Rules of Criminal Procedure, grant a writ of certiorari and elaborate on the statutory inferences in a heroin conspiracy case.

POINT VII

The trial judge must sit as an arbitrator and referee and should not assist the Government in the presentment of their cases, nor should he comment upon the evidence which could effectively deprive the defendants of a fair trial.

U. S. v. *DiSisto,* 289 F. 2d 833, set the guidelines in the Second Circuit for the permissable comment of a trial judge. These comments included the judge's conduct during the course of the trial and the judge's statements during his charge to the jury and/or an attempt to martial the evidence for the jury. The comments by the trial judge stating that "Oree was pretty much the ringleader and entrepeneur here" and complimenting the agents on their arrival "just in the nick of time so as to catch the defendants red-handed" was putting the trial judge in a much greater role than intended. This Court should grant a writ of certiorari to finally determine the maximum role a trial judge can play in a criminal trial.

POINT VIII

A search warrant is not an arrest warrant.

The warrant and arrest were not in conformity with *Preston* v. *U. S.,* 376 U.S. 364, *Chimel* v. *California,* 89 S. Ct. 2034, and *Von Cleef* v. *New Jersey,* 89 S. Ct. 2051.

This Court should grant the Petition for Certiorari to clarify the Constitutional difference between a search warrant and an arrest warrant.

CONCLUSION

In conclusion, the writ should be granted and the Court, in the exercise of its power, should order the judgment of conviction reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1307

ELIZABETH BELLAMY, JAMES HUNTER, MARY MANN AND JAMES D. OREE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1971. The petition for a writ of certiorari was filed on February 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for the arrest of petitioners Hunter and Oree.

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2. Whether petitioners were denied their right to move for suppression.

3. Whether the failure to try a government witness deprived petitioners of their right of cross-examination.

4. Whether the evidence supported petitioner Mann's conviction on the conspiracy count.

5. Whether the trial judge improperly suggested his belief in petitioner's guilt.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners (other than Mary Mann) were convicted of receiving and facilitating the transportation of approximately 390 grams of heroin in violation of 21 U.S.C. 173 and all petitioners were convicted of conspiracy to commit that offense. On April 30, 1970, Oree was sentenced to imprisonment for ten years, Hunter to seven years and the others to five. The court of appeals affirmed.

The evidence showed that in August of 1967, petitioner Oree contacted one Dennis Copeman and asked him if he would be interested in running a "mill" for the packaging of heroin (Tr. 18).[1] Copeman accepted the offer for an agreed salary of $350 per week, plus $150 for running the mill on each occasion of the packaging operation (Tr. 19). Ap-

[1] Dennis Copeman, a co-defendant in this case, testified as a government witness in respect to the details of the narcotics operation. His case was severed from that of other defendants on the government's motion (Tr. 14).

proximately four days after the conversation, Oree called Copeman and informed him that the mill would be in operation that evening at Apartment 3G, 1401 University Avenue, Bronx, New York (Tr. 20). At approximately 9:00 p.m. that evening, Copeman arrived at the apartment, where he met petitioners Mann and Bellamy and one Hopkins (Tr. 21). He saw approximately one-eighth of a kilogram of heroin as well as paraphernalia used for cutting and packaging. Copeman and the others conducted the packaging operation for approximately two and a half hours during which time no other persons either entered or departed from the apartment. Upon completion of packaging, Copeman gave Bellamy $150 and Mann $100. Copeman then left the apartment with the packaged heroin and distributed it to people on the street, delivering the proceeds of the distribution to Oree (Tr. 21–23).

Copeman conducted similar operations for Oree on three or four later occasions. Each time Oree telephoned the location of the operation to Copeman;[2] each time the narcotics and the necessary equipment for packaging were at hand; each time Bellamy and Mann were present; and each time the workers were paid after the packaging was completed. On the day of the arrests as well as on two prior occasions, petitioner Hunter was also present. Oree was at the mill only on the night of the arrests (Tr. 23–24).

[2] In all but one instance, when the operations were carried out at Copeman's residence, the location was the same (Tr. 23, 72).

On November 29, 1967, Oree instructed Copeman to go to Apartment 3G at 1401 University Avenue, to conduct another packaging operation (Tr. 24–25). At approximately 11:00 a.m. Copeman arrived at the apartment,[3] spoke briefly with Bellamy who informed him that "everything was ready," and then departed to take care of some personal business (Tr. 25–26).

At approximately 12:30 p.m. that day, Federal Bureau of Narcotics agents took up surveillance at 1401 University Avenue. A 1967 Oldsmobile bearing license No. XZ2717 was observed parked in front of 1401 University Avenue. At approximately 2:00 p.m. the agents observed Oree driving up to and entering the building with a plaid suitcase (Tr. 85–86, 177; see also affidavit of agent Coursey, *infra,* p. 7). One of the agents followed Oree into the building and saw him enter Apartment 3G (Tr. 144–145). Shortly thereafter, Oree left the building empty-handed and drove away (Tr. 86, 145–146).

Approximately ten minutes later, Mann, Hunter and one Sandra Meade, entered the building. At approximately 3:00 p.m. the agents observed two other women enter Apartment 3G (Tr. 87–88, 146–148, 176–177). One of the agents secured a search warrant for this apartment (Tr. 88–89) and returned to the surveillance area.

At about 5:30 p.m. Copeman returned. Bellamy produced the heroin from a plaid suitcase and processing began under Copeman's supervision. (Tr. 26-28).

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[3] Copeman testified that by this time he had learned that the apartment belonged to Bellamy (Tr. 25–26).

The packaging was finished at approximately 7:00 p.m., when Copeman received a telephone call from Oree asking if the operation had been completed. When Copeman answered that it was, Oree said "Wait for me there." (Tr. 28–29). Oree arrived at about 8:00 p.m. and directed Copeman to give Hunter twenty-five bundles of the packaged heroin. Copeman complied, putting the bundles in a brown paper bag (Tr. 29). Hunter and Oree then left (Tr 30).

The agents arrested Oree and Hunter as they were leaving the building, seized the brown paper bag, and searched both petitioners. The bag held a number of glassine envelopes containing a white powder that proved to be heroin. The search of Hunter revealed a folded ten dollar bill containing a quantity of white powder. (Tr. 89–90, 149–150, 180–182, 195–198).

Four agents then entered the building and encountered Copeman, Barrs, and Wilson getting out of the elevator. They arrested them and seized from Copeman a plaid suitcase found to hold a large number of glassine envelopes containing a white powder that later proved to be heroin (Tr. 91–92, 151–152, 182–183, 195–198).

The agents proceeded to Apartment 3G, knocked on the door, identified themselves as Federal agents, and announced that they had a search warrant. Movement could be heard inside. When no one answered, the agents forcibly opened the door and proceeded to search the apartment and arrest all those present, including Bellamy and Mann (Tr. 92–93, 152–153).

ARGUMENT

1. The facts known to the officers at the time they arrested Oree and Hunter as they were leaving the building are set forth in the affidavit for the search warrant which the officers later executed. The significant portion of that affidavit by agent Coursey of the Bureau of Narcotics is as follows:

> Approximately one week ago your deponent received information from an informant whom he believes to be reliable concerning a "plant" where narcotics were being cut and packaged. The above mentioned informant stated that the informant had been in Apartment 3G of the premises 1401 University Avenue, Bronx, New York, on two prior occasions when narcotics were being cut and packaged. This informant who has been known to your deponent only a short period of time provided information concerning five or six narcotic violators, which information your deponent knows of his own knowledge to be accurate and reliable. The informant stated that the individuals who are in charge of this narcotics plant are known to the informant as "Pee [illegible]ee" and "J.D.". The informant stated that "Pee Wee" drives a 1967 Oldsmobile, license No. XZ2717. The informant further stated that the procedure that is followed with respect to this plant is that the narcotics are first delivered to the "plant" and the workers thereafter gather to cut and package the narcotics.
>
> On November 29, 1967, I received word from the informant that narcotics would be delivered to the "plant" and the workers would thereafter gather to cut and package the narcotics. Your deponent and other agents of the Federal Bu-

reau of Narcotics took up surveillance in the vicinity of 1401 University Avenue, Bronx, New York, at approximately 12:30 P.M. today. The 1967 Oldsmobile, license plate No. XZ2717 was observed parked in the vicinity of 1401 University Avenue, Bronx, New York. This particular car is registered to Beatrice Simmons, 856 East 228th Street, Bronx, New York. Beatrice Simmons is the wife of Hank Simmons. Hank Simmons is the subject of two narcotic cases in this district and in both cases cars were seized from Hank Simmons which were registered in the name of his wife Beatrice Simmons. At approximately 2:15 P.M., a 1968 Cadillac, license No. RR2356, was observed to park in the vicinity of 1401 University Avenue, Bronx, New York. An individual carrying a small suitcase was observed going into 1401 University Avenue, and was followed to the third floor. Shortly thereafter this same individual was observed exiting the premises 1401 University Avenue and at that time did not have the suitcase in his possession. The above described 1968 Cadillac is registered to J. D. Oree. A check of the files of the Federal Bureau of Narcotics reveals that J. D. Oree has a previous conviction for violation of the Federal Narcotic Laws. Thereafter, the above described informant was observed, along with other persons, entering 1401 University Avenue, Bronx, New York.

For the foregoing reasons your deponent has reason to believe that narcotics and paraphernalia used for the cutting and packaging of narcotics are now being kept and concealed in Apartment 3G of the premises 1401 University Avenue, Bronx, New York.

As the affidavit shows, through the informant's visits to the apartment he had personal knowledge of the information he related to the agent; this, in addition to the five or six prior occasions when the informant provided the agent with accurate information about narcotics violations, was more than sufficient not only to meet the test of reliability set forth in *Spinelli* v. *United States,* 393 U.S. 410, but also to lay the foundation for the arrests made after further observation. The agents' independent surveillance tended to confirm the veracity of the information that a heroin processing operation was in progress. By the time Oree and Hunter were seen leaving the building at 8:00 p.m., the agents knew Oree had entered the apartment with a suitcase but had left without it. The agents also had observed Hunter entering the building with two women in the afternoon. When the agents saw the two men, one carrying a brown paper bag, emerge together from the building, they had probable cause to believe that both men were involved in the processing operation and arrests were therefore proper.

2. The claim that the district court erred in denying a separate hearing on the issue of probable cause to arrest is fully answered in the opinion below. Since the sufficiency of the affidavit for the search warrant is clear and since the evidence at trial firmly established that there had been probable cause for the arrests, the trial judge properly declined to hold a separate hearing at the close of the government's case.

3. Petitioners contend that the government's failure to try Copeman deprived them of a substantial right of cross-examination. To the contrary Copeman was extensively cross-examined about whether his testimony was the result of an agreement to recommend clemency (Tr. 31–34, 44, 46–48, 59–60).

4. Petitioner Mann contends that the jury's failure to find her guilty on the substantive count shows that she was not in possession of the heroin and that therefore the evidence to support her conviction on the conspiracy count was insufficient. Copeman testified, however, that on each occasion of the packaging operation Mann was present and participated in the work of packaging heroin. That the jury chose to acquit her of the substantive count even though she did have possession of the heroin does not mean that it could not at the same time make the findings necessary to convict her of conspiracy.

5. Petitioners' contention that statements made during the instructions showed the judge's belief in petitioners' guilt is answered in the opinion below. In each instance the statements were preceded by cautionary statements such as "if you believe the evidence of Copeman and the agents * * *" (Tr. 278) and "Now as to Oree, if you accepted all the evidence submitted by the Government and draw from it the inferences which they suggest, you would be justified in concluding * * *" (Tr. 280). In response to Oree's objection to this instruction, the court said that it would further instruct the jury in order to dispel any

impression that the court believed the defendants were guilty (Tr. 293). In his supplemental instructions the judge stated "I made some reference to the defendant Oree as an entrepreneur or words to that effect. Here again, you are quite free to determine that Oree was not an entrepreneur, you are quite free to come to the conclusion that he should be acquitted. That is entirely up to you" (Tr. 308; see also Tr. 311).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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